82-1169

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CPC INTERNATIONAL INC.,

Petitioner

v.

DIMMITT AGRI INDUSTRIES, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a court of appeals have the power under 28 U.S.C. § 2106 to order a new trial of a jury finding that no party has appealed and that the court need not examine in order to dispose of a separate jury finding before it on appeal?

2. Should this Court resolve the clear conflict between the decision of the court below and decisions of this Court holding that the Seventh Amendment right to a jury trial precludes an order of a new trial based on a supposed conflict in jury findings that can readily be reconciled?

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the court below are those named in the caption of the case in this Court.

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OPINIONS BELOW

The opinion of the court of appeals below is reported at 679 F.2d 516 and is reprinted as Appendix A. The opinion of the court of appeals denying rehearing en banc is reprinted as Appendix C.

JURISDICTION

The decision of the court of appeals was entered on July 2, 1982. A timely suggestion for rehearing en banc was denied by order of October 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully brought before it for review*, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(emphasis added)

2. The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioner (defendant below), CPC International Inc. ("CPC"), is engaged in the business of corn wet milling, which consists of producing and selling cornstarch, corn syrup, and other products derived from corn as a raw material. In 1974, Respondent (plaintiff below), Dimmitt Agri Industries, Inc. ("Dimmitt"), sued CPC and eight other corn wet millers,[1] alleging that in 1971 and 1972, defendants had lowered their prices in order to drive Dimmitt, a new entrant, out of business. Dimmitt sought jurisdiction under 15 U.S.C. § 15 and alleged five different antitrust offenses: (1) a price fixing conspiracy under Section

[1] All of the defendants except CPC settled before trial.

1 of the Sherman Act;[2] (2) conspiracy to monopolize, (3) attempt to monopolize, and (4) monopolization, all under Section 2 of the Sherman Act;[3] and (5) price discrimination under the Robinson-Patman Act.[4]

During the seven-week trial of this lawsuit, Dimmitt and CPC offered the jury two dramatically different views of events in the corn wet milling industry during 1971 and 1972. *See* 679 F.2d at 522-25. With respect to its charges of monopolization and attempt to monopolize, Dimmitt presented evidence, primarily through CPC's internal memoranda, which allegedly showed that CPC had lowered its list prices for cornstarch and corn syrup in order to stabilize price levels, to discourage other competitors from entering or expanding, and specifically to eliminate Dimmitt from the market. *Id.* at 522-24. CPC, on the other hand, provided evidence that increased production in the industry had caused a substantial excess of supply over demand for cornstarch and corn syrup, that the excessive supply along with other market factors beyond the control of CPC had led to a severe price war during 1971 and 1972, and that CPC had adopted a defensive strategy of reducing prices to meet competitive offers in order to prevent further erosion of its market shares and indeed to assure its survival in the industry. *Id* at 524-25.[5] Thus, in order to answer interrogatories concerning Dimmitt's antitrust charges, particularly the monopolization and attempt to monopolize counts, the jury had to resolve the basic dispute between the parties concerning CPC's posture and motives in lowering its prices for cornstarch and corn syrup.

After both parties had rested, the trial court, over CPC's objection, submitted the case to the jury on all of the above

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[2] 15 U.S.C. § 1.

[3] 15 U.S.C. § 2.

[4] 15 U.S.C. § 13.

[5] *See* Brief of Appellant at 3-10.

five theories. The jury returned a verdict consisting of special interrogatory answers in CPC's favor on all claims except monopolization, and on that issue the jury found that CPC had monopolized the national markets for cornstarch and corn syrup.[6] The jury further found that Dimmitt had been injured by CPC's antitrust violation in the amount of $1,500,000.

CPC filed a timely motion for judgment nothwithstanding the verdict with respect to the monopolization finding on the ground that CPC, as a matter of law, did not possess monopoly power during the relevant time period of 1971 and 1972. Dimmitt did not challenge the jury's findings in any respect and moved for judgment on the verdict. The trial court denied CPC's motion for judgment n. o. v. and entered judgment for Dimmitt in the amount of $5,300,000.00, representing treble damages of $4,500,000.00 plus attorneys' fees of $800,000. CPC appealed from the denial of its motion for judgment n. o. v.; Dimmitt did not cross appeal.

The undisputed evidence was that during 1971 and 1972, CPC's "maximum possible market shares were 25 percent and 17 percent for the national cornstarch and national corn syrup markets respectively." 679 F.2d at 528. Because of these low market shares and the absence of sufficient countervailing conduct evidence of control over prices, the Fifth Circuit Court of Appeals held that the trial court's judgment based on the jury's finding of monopolization must be reversed as a matter of law. 679 F.2d at 530-31. At that point, however, rather than rendering judgment for

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[6] The special interrogatories, along with the jury's answers, are quoted in the Fifth Circuit's opinion. *See* 679 F.2d at 519-20 n.2. While the monopolization interrogatory, No. II, did not specifically identify relevant markets, CPC assumes for purposes of this appeal that the jury found monopolization of both relevant markets alleged by Dimmitt.

CPC, the court of appeals went on to consider the jury's finding on the attempt to monopolize offense, even though Dimmitt had never challenged or appealed from this finding.

With respect to the first element of the attempt offense, the requirement of a specific intent to monopolize, the court found that the only possible view of the evidence was that CPC had acted with such specific intent in lowering its prices for cornstarch and corn syrup. *Id.* at 534. With respect to the requirement of a dangerous probability of success, the second element of the attempt to monopolize offense, the court felt that after finding that CPC possessed monopoly power for purposes of its answer to the monopolization interrogatory, the jury could not have also found that there was no dangerous probability of monopolization by CPC. *Id.* In sum, according to the court of appeals, "[t]he only conceivable explanation for the jury's verdict" was that its affirmative finding on the monopolization interrogatory made an affirmative finding of an attempt to monopolize "redundant and unnecessary." *Id.* Based on this supposedly unambiguous and indisputable conclusion, the court, *sua sponte,* reversed the attempt verdict and remanded it for a second trial, citing Fed. R. Civ. P. 50(d) as authority for this ruling. *Id.*

CPC submitted a suggestion for rehearing en banc to the Fifth Circuit, urging that Fed. R. Civ. P. 50(d) does not authorize a court of appeals to order a new trial of an unchallenged jury finding. In addition, CPC contended that because there was no irreconcilable conflict between the jury's findings on the monopolization and attempt to monopolize interrogatories, the court of appeals could not order a new trial of the attempt to monopolize finding without violating CPC's Seventh Amendment right to a jury trial. The Fifth Circuit denied the suggestion for rehearing en banc, and the present petition followed.

REASONS FOR GRANTING THE WRIT

I. In Ordering a New Trial of a Jury's Unchallenged Finding That Was Independent and Separate from the Only Finding on Appeal, the Fifth Circuit Has Exceeded the Authority of a Court of Appeals Under 28 U.S.C. § 2106.

United States courts of appeals derive their existence from Article III of the Constitution and possess only such jurisdiction as is conferred by statute.[7] 28 U.S.C. § 2106 provides that a court of appeals can rule only with respect to a judgment, decree, or order "lawfully brought before it for review." From a jurisdictional standpoint, this Court has never declared the limits imposed on courts of appeals in ordering new trials of jury findings that have not been appealed. This case presents an opportunity for the establishment of a basic rule that will prevent courts of appeals from abusing their power in reviewing non-appealed jury findings.

The fundamental statutory issue posed by this petition is one of appellate court power. The judgment that was "lawfully brought before [the court of appeals] for review" in this case was entered pursuant to a jury verdict that CPC was liable for the offense of monopolization; the other counts, including attempt to monopolize, were rejected by the jury and duly dismissed. The court of appeals reversed the monopolization verdict as a matter of law on the basis of CPC's lack of monopoly power. The question now presented is whether the court of appeals, having dismissed the monopolization count, had authority, on its own motion, to review, reverse, and remand the attempt count although (1) Dimmitt had not challenged the jury's negative finding

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[7] *See* 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 110.01, at 47 (2d ed. 1982); 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, at 395 (1976).

on this count, (2) the district court had not seen fit to order a new trial of the attempt count on its own motion pursuant to Fed. R. Civ. P. 59(d), and (3) consideration of the attempt issue was not necessary to the Fifth Circuit's determination of the matter before it for review.

While this petition focuses on the power of an appellate court to reverse non-appealed jury findings on its own motion, the scope of matters properly before a court of appeals is ordinarily circumscribed by the obligation of litigants to preserve and appeal errors allegedly committed in the district court. One of the most basic and hallowed principles of appellate procedure is that a court of appeals will not consider alleged error with respect to a jury finding that has not been appealed. For example, when a defendant appeals concerning alleged error in connection with a jury finding based on one of a plaintiff's multiple legal theories, the plaintiff as appellee must cross appeal in order to assert error with respect to a finding on a separate and independent theory.[8] In *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924), Justice Brandeis provided the classic statement of the rules concerning the scope of an appellee's rights as follows:

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a

[8] *See* 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 204.11 [2] to [3], at 4-42 to 4-44 (2d ed. 1982); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3950, at 367-68 (1977).

> cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

Id. at 435. Thus, an appellee must preserve error and file an appeal in order to have standing to seek modification or reversal, as opposed to an affirmance, of the district court's judgment.

In *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185 (1937), a surety sued a contractor for which it had issued a bond in connection with a construction contract. The surety alleged two separate theories of liability — exoneration and specific performance. The trial court held that the surety was entitled to exoneration, but not to specific performance, and entered judgment accordingly. *Id.* at 189. Only the contractor appealed. After rejecting the judgment based on exoneration, the court of appeals held in favor of the surety on a theory of specific performance. This Court granted certiorari "to fix the measure of relief available to a non-appealing suitor." *Id.* at 190.

After quoting the relevant language from *American Railway Express Co.*, Justice Cardozo declared that the rule of that case "is inveterate and certain." *Id.* at 191.[9] While recognizing that exoneration and specific performance are "not very different," this Court nevertheless held that specific performance could not be awarded because the appellee had not raised this issue on appeal. *Id.* at 193. The decree of the court of appeals was therefore reversed.[10]

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[9] A long line of decisions was cited in support of this proposition.

[10] In the context of a petition for certiorari, this Court reaffirmed the rule of *Morley Construction Co.* and *American Railway Express Co.* in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970).

The decision of the Fifth Circuit in this case is contrary to these well-settled rules governing the rights of an appellee. In asserting a power to act on its own which courts have denied to the non-appealing litigants themselves, the Fifth Circuit has aggrandized appellate powers with considerable potential for extending and even redirecting the course of a litigation. After holding as a matter of law that there was insufficient evidence to support the jury's affirmative finding of monopolization, the court refused to enter judgment for CPC and instead ordered a new trial of the totally independent negative finding on the attempt to monopolize count, which Dimmitt had not appealed. If appellate courts may intervene in this fashion, particularly with respect to multiple count verdicts, the final resolution of a lawsuit may become an ever-receding horizon.

The Fifth Circuit made no effort to justify this assertion of appellate prerogative other than to cite Fed. R. Civ. P. 50(d) as the source of its supposed authority to order a new trial on the attempt to monopolize count. 679 F.2d at 534. Rule 50(d) specifies the rights of an appellee when the trial court has denied a motion for judgment n. o. v. filed by the appellant. In this case, the Fifth Circuit's order of a new trial on the attempt finding was completely beyond the scope of the monopolization finding that formed the basis of CPC's motion for judgment n. o. v. While the last sentence of Rule 50(d) indicates that a court of appeals may order a new trial on its own motion, nothing in this language or the Advisory Committee's notes to Rule 50(d)[11] suggests that this power to require a new trial

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[11] *See* Appendix C (quoting a portion of these notes). In fact, the Advisory Committee's notes specifically state that "Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n. o. v. and any accompanying motion for a new trial are denied, since the problems have not

extends to a jury finding independent and separate from the finding as to which the motion for judgment n. o. v. was filed.[12] Moreover, Rule 50(d) cannot add to the scope of statutory authority granted by Congress to courts of appeals under 28 U.S.C. § 2106.

In short, CPC submits that an appellate court's power to adjudicate derives from the issues lawfully brought before it by the litigants. Accordingly, a court of appeals may not *sua sponte* reverse a jury finding that has not been appealed unless such action is unavoidably necessary to the court's determination of the matter on appeal. If, for example, a non-appealed jury finding was in conflict with an appealed finding that was being remanded for a new trial, the court of appeals might conclude that both

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been fully canvassed in the decisions and the procedure is in some respects still in a formative stage."

In *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949), cited in the Advisory Committee's notes, this Court held that the defendant could not be liable as a common carrier for failure to exercise the highest degree of care, but then remanded for consideration of whether a new trial should be ordered concerning the defendant's alleged negligence as a general agent. In ordering consideration of a new trial, the Court may well have been influenced by the fact that it had first declared on the very same day that a general agent like the defendant could not be liable as a common carrier. *Id.* at 805. In any event, *Weade* turned on the standard of care applicable to the defendant under one given set of facts rather than two separate offenses with different elements and different supporting facts. *See infra* pp. 11-15.

[12] Nor does Professor Moore's treatise, which is cited by the Fifth Circuit (679 F.2d at 534), provide support for the proposition that when an appellate court has reversed and rendered judgment on a properly appealed jury finding, Rule 50(d) authorizes the court to reverse and remand for retrial an independent finding as to which no appeal was filed. *See* 5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 50.15 (2d ed. 1982).

In *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 329 (1967), this Court said in dictum that under Rule 50(d), "[i]f appellee presents no new trial issues in his brief or in a petition

claims must be remanded in order to provide a meaningful and comprehensive second trial. In this case, however, the monopolization finding was not remanded for a new trial and the Fifth Circuit did not need to rule on the attempt to monopolize finding in order to dispose of the issue raised on appeal by CPC concerning the monopolization finding.

Indeed, the sole basis of the Fifth Circuit's decision to order a new trial on the attempt to monopolize count is its conclusion that after finding CPC guilty of monopolization, the jury presumably felt that it would be "redundant and unnecessary" to find CPC also guilty of an attempt to monopolize. 679 F.2d at 534. In effect, the court is saying that if the jury had known that its monopolization finding would be rejected as a matter of law, it would surely have found CPC guilty of an attempt to monopolize. Thus, in order to justify its decision to reverse and remand the negative finding on the attempt to monopolize count, the court has necessarily determined that this finding is in irreconcilable conflict with the affirmative finding on the monopolization count. Even if the court were authorized to engage in this strained and speculative effort to link the monopolization and attempt to monopolize findings, its inference of an inherent conflict is fallacious because the elements of these two offenses are different and substantial evidence in the record independently supports the jury's negative finding on the attempt to monopolize charge.

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for rehearing, the court of appeals may, in any event, order a new trial on its own motion or refer the question to the district court, based on factors encountered in its own review of the case." Since *Neely* involved only one jury finding that had been appealed, however, this statement does not support the proposition that a court of appeals may rely on Rule 50(d) to order a new trial of an independent jury finding that has not been appealed.

A. Differences Between the Intent Requirements for the Monopolization and Attempt to Monopolize Offenses

As the jury in this case was clearly instructed, there are two fundamental differences between the intent elements of the monopolization and attempt to monopolize offenses under Section 2 of the Sherman Act, 15 U.S.C. § 2. *See* 679 F.2d at 531-32 n.17. First, the intent requirement for an attempt to monopolize is more stringent because the defendant must have acted with a *specific intent* to acquire monopoly power — the power to control prices or exclude competition in the relevant market.[13] For monopolization, on the other hand, all that is required is proof of a *general intent* to engage in conduct later determined to be anticompetitive because, in the words of Judge Learned Hand, "no monopolist monopolizes unconscious of what he is doing." *United States* v. *Alumnium Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945). Second, the intent requirement for an attempt to monopolize can be met only by evidence that the defendant was *seeking to acquire* monopoly power. 679 F.2d at 531-32 n.17. The intent element of monopolization, by contrast, can be satisfied by proof that the defendant willfully either *"obtained, or maintained,"* monopoly power. *Id.* (emphasis added).

While a detailed review of the evidence seems inappropriate in this application for certiorari, even the brief references to CPC's proof in the Fifth Circuit's opinion demonstrate that the jury could readily have concluded that CPC's intent was sufficient for monopolization, but not for an attempt to monopolize. *See, e.g.*, 679 F.2d at 524-25. Logically, if the jury concluded that CPC already had monopoly power for purposes of its monopolization finding, it would be reasonable also to decide that CPC was

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[13] *See* 679 F.2d at 531-33 & n.17; *United States v. Griffith*, 334 U.S. 100, 105-06 (1948); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905) (Holmes, J.); *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945).

not simultaneously attempting to acquire monopoly power. Furthermore, since the undisputed evidence was that CPC's market share goals were no higher than its actual market shares during 1971 and 1972,[14] the jury could reasonably have found that CPC was attempting to maintain its existing market power — and not to acquire additional power.

Dimmitt contended that CPC's predatory pricing practices demonstrated its specific intent to monopolize. More specifically, Dimmitt alleged that CPC had engaged in predatory pricing designed to increase its market shares and thereby to achieve monopoly power over sales of cornstarch and corn syrup. In response, CPC maintained that its pricing practices were competitive, directed toward defending its market shares — and not predatory. If the jury accepted CPC's contention that it had not engaged in predatory pricing, they could readily have concluded that CPC's conduct was sufficient to constitute monopolization, but not an attempt to monopolize. *See* 679 F.2d at 531-32 n.17.[15]

B. Differences Between the Power Requirements for the Monopolization and Attempt to Monopolize Offenses

The power elements of the monopolization and attempt to monopolize offenses are different: monopolization requires proof that the defendant actually possessed monopoly power, while an attempt to monopolize can occur even if there is only evidence of a dangerous probability that the defendant will succeed in acquiring monopoly power. It is conceivable that a party could be found liable for monopolization and attempt to monopolize in the same lawsuit. Because of the differences between the pow-

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[14] *See* 679 F.2d at 521, 527 n.9.

[15] *See* III P. Areeda & D. Turner, Antitrust Law ¶¶ 711, 829 (1978). The Fifth Circuit implicitly recognizes the weakness of Dimmitt's evidence on the predatory pricing issue. *See* 679 F.2d at 534 n.21.

er elements of these two offenses, however, the violations could not occur simultaneously; the attempt to monopolize would necessarily precede the monopolization. As the defendant's market share increased, it would move from posing a dangerous threat of acquiring monopoly power (an attempt to monopolize) to the actual possession of monopoly power (monopolization). In this case, however, it is undisputed that CPC's market shares for cornstarch and corn syrup did not increase during the relevant time period of 1971 and 1972. Thus, the same course of conduct alleged to have brought about Dimmitt's business failure in 1972 could not have been thought to result both from the exercise of monopoly power *and* an effort to acquire such power. The jury, clearly, chose the former view of these events.

An even more basic question concerns why the Fifth Circuit should rely on the inherently subjective process of psychoanalyzing the jury as a substitute for an objective review of the evidence in the record concerning the dangerous probability issue. Since the court determined that there was insufficient evidence to support the finding that CPC possessed monopoly power, it would certainly be reasonable to conclude that Dimmitt had also failed to meet its burden of proving a dangerous probability of CPC's success in acquiring monopoly power. Specifically, given the court's recognition that market shares of 25% or less were not consistent with the existence of monopoly power, and given the undisputed evidence that CPC's maximum market share goals were 25% for cornstarch and 17-18% for corn syrup (679 F.2d at 527 n.9), the record could support only one conclusion — there was no dangerous probability that CPC would succeed in achieving a monopoly.[16]

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[16] The Fifth Circuit did not even mention the undisputed evidence of significant new entry and expansion in the relevant markets for cornstarch and corn syrup, as well as the undisputed evidence

Thus, the jury's findings on monopolization and attempt to monopolize can readily be reconciled, and the no attempt to monopolize finding stands on its own, fully supported by substantial evidence in the record. Under these circumstances, the court of appeals did not need to remand the no attempt to monopolize finding for a new trial in order to dispose of the monopolization finding.

This Court has never specifically addressed the question of the limits on the authority of courts of appeals to order new trials of jury findings that have not been appealed.[17] Because this area of the law is not settled, however, the Fifth Circuit's claim of unlimited jurisdiction to order new trials under Rule 50(d) creates a serious problem for federal district courts. Several members of this Court have spoken in recent years concerning the increasingly burdensome caseloads of district courts which threaten to under-

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concerning the extreme competitiveness of these markets, which totally undermine the contention that CPC was likely to succeed in monopolizing these markets. *See* Brief of Appellant at 31-38; III P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 831, at 336 (1978).

[17] On more than one occasion, however, this Court has indicated that trial courts are far better qualified than courts of appeals to determine whether new trials should be ordered. *See Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947). *Cf. Small v. Olympic Prefabricators, Inc.*, 588 F.2d 287, 290 (9th Cir. 1978) (Under Oregon law, an appellate court does not have power to reverse a judgment based on an error that has not been preserved and appealed.).

In *Langnes v. Green*, 282 U.S. 531 (1931), this Court stated in dictum that it had jurisdiction to review objections even though they had not been raised in a petition for certiorari. *Id* at 538. The Court held, however, that in any event, the respondent's failure to raise an objection in a cross-petition for certiorari was immaterial because in urging this objection, he was seeking to affirm rather than reverse the decree of the court of appeals. *Id.* (citing *United States v. American Railway Express Co., supra* pp. 7-8). In addition, the Court did not discuss, even in dictum, the special circumstances that would justify its exercise of this admittedly limited jurisdiction.

mine our entire system of justice. The record of the district court's performance in this case, including her submission of all five claims asserted by Dimmitt, demonstrates that she conscientiously and carefully gave Dimmitt a full and fair trial.[18] The district courts in this country have more than enough cases to try without having unnecessary retrials imposed because appellate courts disagree with the jury's assessment of conflicting evidence.[19] CPC urges this Court to declare that a court of appeals has no authority to order a new trial of a jury finding that has not been appealed and that need not be considered in order to dispose of a separate finding properly raised on appeal.

II. The Fifth Circuit's Remand of the Jury's Finding on the Attempt to Monopolize Offense Directly Conflicts with Prior Decisions of This Court Concerning the Seventh Amendment Right to a Jury Trial.

The Seventh Amendment of the Constitution provides that in federal civil lawsuits, "the right of trial by jury shall be preserved, and *no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*" (emphasis added) By positing a supposed inconsistency in jury findings that can readily be explained and reconciled, the Fifth Circuit has violated established principles declared in pre-

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[18] Dimmitt's counsel, a highly experienced antitrust trial lawyer, clearly made a conscious election to seek judgment on the verdict rather than to attack the jury's independent finding on the attempt to monopolize count.

[19] A court of appeals, remote from the realities of the trial, readily persuades itself to accept the documentary record before it as the litigative universe in which to try the issues, even those not before it, *de novo*. It is all too apparent from a reading of the court's opinion in this case that, having drawn its own conclusions on the merits, the court recast the jury's Section 2 findings to conform to its views, thereby subverting the no attempt verdict in order to justify relitigating the case.

vious decisions interpreting the Seventh Amendment.[20] To insure the continued vitality of our jury trial system, this Court should announce clearly that under the Seventh Amendment, a conflict in jury findings must be unambiguous and irreconcilable in order for a court of appeals to order a new trial.

In *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), the court of appeals had held that the facts found by the jury as the basis for the primary defendant's liability also necessarily established a third-party defendant's liability under a related, but distinct, claim; accordingly, after affirming the judgment against the primary defendant, it had reversed the judgment for the third-party defendant. This Court reversed the court of appeals and reinstated the entire jury verdict:

> We might agree with the Court of Appeals had the questions of fact been left to us. But *neither we nor the Court of Appeals can redetermine facts found by the jury* any more than the District Court can predetermine them. For the Seventh Amendment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Id. at 358-59 (emphasis added).

The Court in *Atlantic & Gulf Stevedores* determined that the apparent conflict within the jury's verdict could rationally be attributed to the slight differences between the theories under which the defendant and the third-party defendant were alleged to be liable. That being the case,

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[20] The Fifth Circuit relies on Fed. R. Civ. P. 50(d) as supposed authority for its new trial order in this case. 28 U.S.C. § 2072, however, explicitly states that the rules of civil procedure promulgated by the Supreme Court "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

the court of appeals was barred by the Seventh Amendment from upsetting the jury's verdict based on its own view of the evidence:

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. *For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.*

Id. at 364 (emphasis added). In *Gallick* v. *Baltimore & Ohio Railroad*, 372 U.S. 108, 119 (1963), this Court reiterated that courts "must attempt to reconcile the jury's findings, by exegesis if necessary, . . . before [they] are free to disregard the jury's special verdict and remand the case for a new trial."

In explaining its rationale for ordering a new trial, the Fifth Circuit does not expressly rely on a supposed conflict between the jury's findings on the monopolization and attempt to monopolize offenses. *See* 679 F.2d at 533-34.[21] Rather, according to the court, a new trial is required because "[t]he only conceivable explanation for the jury's verdict" is that the jury felt an affirmative finding of an attempt to monopolize was "redundant and unnecessary" after it had found CPC guilty of monopolization. *Id.*[22]

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[21] The court's avoidance of any reference to a conflict in jury findings probably stems from its own recent decisions clearly recognizing the Seventh Amendment requirement imposed on courts of appeals by *Atlantic & Gulf Stevedores* and its progeny. *See Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1040 (5th Cir. 1982); *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 65-66 (5th Cir. 1982); *Harville v. Anchor-Wate Co.*, 663 F.2d 598, 604 (5th Cir. 1981) (Gee, J.).

[22] As support for this conclusion, the Fifth Circuit quotes the Areeda and Turner treatise as follows: "To say that one who has monopolized has also attempted to monopolize is redundant and adds nothing to the scope of available remedies. The

This conclusion, however, necessarily implies that under the court's view of the evidence, the jury could not possibly have found CPC liable for monopolization and not liable for an attempt to monopolize. Thus, in the Fifth Circuit's view, a new trial will allow a second jury to return the verdict on the attempt to monopolize count that the first jury presumably would have reached if it had known that its monopolization finding would be set aside.

As previously explained, there is no irreconcilable conflict between the jury's affirmative finding on monopolization and its negative finding on attempt to monopolize. *See supra pp.* 11-15. It is mere speculation for the Fifth Circuit to assert unequivocally that the jury felt a finding of an attempt to monopolize was "redundant and unnecessary" in light of its finding of monopolization. For any of several reasons relating to the differences between the elements of the two offenses and the evidence required to prove those elements, the jury could logically have found that CPC had monopolized the relevant markets for cornstarch and corn syrup, but had not also attempted to monopolize those markets. Contrary to this Court's directive in *Atlantic & Gulf Stevedores,* the court of appeals in this case has engaged in "a search for one possible view of

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attempt is merged into the completed offense." 679 F.2d at 531, 534 (quoting III P. Areeda & D. Turner, Antitrust Law ¶ 830e, at 335 (1978)).

This quotation, however, should not be construed to support the proposition that there is no difference between the monopolization and attempt to monopolize offenses. The sentence in the treatise immediately following the two quoted sentences makes this point clear: "Of course, the plaintiff may plead both offenses and allow the court to base its disposition on *either* or neither offense as the evidence emerges." (emphasis added) Even the Fifth Circuit acknowledges that the two offenses do not inevitably occur together: "Note that we are not saying that all monopolization offenses must necessarily involve an attempt offense." 679 F.2d at 534 n.20.

the case which will make the jury's finding inconsistent" when there are several other views that make "the jury's answers to special interrogatories consistent." *See* 369 U.S. at 364.

This is not a case such as *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 808-09 (1949), where there was evidence supporting a second basis of liability, but that issue had not been submitted to the jury. Nor is this case like *Iacurci* v. *Lummus Co.*, 387 U.S. 86 (1967), where the jury found the defendant negligent in one respect and simply did not answer four additional interrogatories inquiring about other possible grounds of negligence. In these two cases, there were no jury findings to be protected by the Seventh Amendment. Furthermore, the failure of the *Iacurci* jury to answer the four interrogatories strongly indicated that it considered such answers "redundant and unnecessary" in the light of the answer it had already given.[23] In this case, it is only surmise by the Fifth Circuit that the jury reached a similar conclusion in answering affirmatively on the monopolization interrogatory and negatively on the attempt to monopolize interrogatory.

The test of when answers to interrogatories are so in conflict that they cannot be reconciled is properly a stringent one. *See, e.g., Gallick* v. *Baltimore & Ohio Railroad*, 372 U.S. 108, 119-21 (1963). In *Mercer* v. *Long Manufacturing N.C., Inc.*, 665 F.2d 61 (5th Cir. 1982), the

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[23] This Court remanded for consideration of a new trial because the jury had not answered four of the five interrogatories asking about possible grounds of negligence. While the Court disagreed with the conclusion of the court of appeals that the jury's failure to answer these interrogatories demonstrated that the defendant's negligence was not established, the clear implication was that a new trial would not have been appropriate if the jury had answered these interrogatories in the negative, as was the case here. *See* 387 U.S. at 87-88.

jury found that the defendant had committed a breach of warranty, but had not violated the Texas Deceptive Trade Practices Act, even though the jury had been instructed that a breach of warranty is a violation of the Act. The Fifth Circuit held that this conflict in jury findings satisfied the Seventh Amendment test and remanded both findings for a new trial. *Id.* at 65-66. In this case, by contrast, the monopolization and attempt to monopolize counts required different elements of proof, the jury was separately instructed concerning those different elements, and the jury was expressly instructed that three separate offenses are included within Section 2 of the Sherman Act and that "[y]ou are to consider separately the facts with regard to each alleged offense." 679 F.2d at 531-32 & n.17. Thus, in concluding that "[t]he only conceivable explanation" for the negative answer on the attempt to monopolize count was that "the jury saw the attempt offense as redundant and unnecessary given its finding of the more serious violation" (679 F.2d at 534), the Fifth Circuit has assumed that the jury disregarded the explicit instruction to consider separately the facts with regard to each alleged offense, has violated CPC's Seventh Amendment right to a jury trial, and has rendered a decision in direct conflict with prior decisions of this Court.[24]

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[24] The Fifth Circuit's new trial order also conflicts with decisions of other courts of appeals which have followed *Atlantic & Gulf Stevedores*. *See Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 293 (3d Cir. 1980); *Franklin Music Co. v. American Broadcasting Cos.*, 616 F.2d 528, 533-34 & n.4 (3d Cir. 1979) ("The scope of this court's review of jury findings is thus far narrower than the clearly erroneous standard to be applied in review of facts found in non-jury trials."); *Wagner v. Int'l Harvester Co.*, 611 F.2d 224, 228-29 & n.5 (8th Cir. 1979); *Ressler v. States Marine Lines, Inc.*, 517 F.2d 579, 582 (2d Cir.), *cert. denied*, 423 U.S. 894 (1975); *Henry v. A/S Ocean*, 512 F.2d

Under the evidence in this case, as noted above, CPC could not possibly have been both monopolizing and attempting to monopolize to Dimmitt's detriment during the relevant time period. *See supra* pp. 13-14. These two separate antitrust charges presented the jury with alternative, indeed inconsistent, versions of the events in 1971 and 1972 which led to Dimmitt's business failure. The jury's findings indicate that it accepted a factual view based on a theory of defensive monopolization, albeit on a legally erroneous premise concerning the requirements for proof of monopoly power. Yet the remand ordered by the court of appeals would permit a second jury to take a different and perhaps contradictory view of the same basic facts. The Seventh Amendment was obviously designed to prevent such an anomalous result.[25]

401, 405-06 (2d Cir. 1975); *Kirkendoll v. Neustrom*, 379 F.2d 694, 699 (10th Cir. 1967). *Cf. Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1055 (4th Cir.) (Because "our power of review continues to be limited by the Seventh Amendment, . . . [w]e may not . . . weigh the evidence, pass on the credibility of witnesses, or substitute our judgment of the facts for that of the jury."), *cert. denied*, 429 U.S. 980 (1976).

[25] The fact that the Fifth Circuit has ordered a new trial should not deter this Court from accepting this application for certiorari. This Court has reviewed new trial orders issued by courts of appeals when the ruling below was "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). In this case, a resolution in CPC's favor of the issues raised in this petition for certiorari would finally conclude this protracted antitrust suit. Furthermore, CPC's Seventh Amendment rights are meaningless if they can only be invoked after a lengthy and expensive second trial.

CONCLUSION

The antitrust issues in this case have now been fully resolved: the court of appeals reversed as a matter of law the judgment based on monopolization, the jury's only finding in Dimmitt's favor. The Fifth Circuit's order of a new trial on the attempt to monopolize count, however, raises procedural and constitutional issues of far broader significance which concern the critical division of responsibilities between judges and juries in our system of jurisprudence. CPC respectfully urges this Court to consider these important issues, to preserve the integrity of the American jury system, and to reverse the unprecedented order of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were sent by United States mail, first-class postage prepaid, to the following counsel of record for Respondent, Dimmitt Agri Industries, Inc., this 10th day of January, 1983:

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